Supreme Court, U.S.
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No. 00-1614

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION

Petitioner,

v.

ABNER J. MORGAN, JR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case arises out of a horrendous pattern of blatant racial harassment, race discrimination and retaliation at AMTRAK's Yard in Oakland, California. For five years, ABNER MORGAN, an African-American electrician, endured a torrent of racially motivated actions, including retaliatory disciplinary actions, denial of career and training opportunities, punitive job assignments, physical assault by the Yard's highest official, and termination based upon a fabricated accusation of threatening a supervisor.[1]

Even after the trial court improperly limited AMTRAK's liability, the evidence at trial portrayed a Yard environment permeated with racially derogatory comments and acts, racially motivated personnel practices, and blatant retaliation against anyone perceived to be aligned with MR. MORGAN, all perpetrated and condoned by the same small cabal of managers.[2]

Following two and a half days of deliberation, the jury exonerated AMTRAK only with the gravest misgivings, and

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[1]The gravamen of the appeal was the district court's error in ruling favorably on Amtrak's Motion for Summary Judgment; accordingly, the posture of the case requires that the facts be construed in the light most favorable to Mr. Morgan. (*Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).)

[2](*See Morgan v. National Railroad Passenger Corp.*, 232 F.2d 1008, 1013 (9th Cir. 2000.)

was clearly hamstrung by the trial court's improper rulings on the law.[3]

AMTRAK seeks to invoke review by this Court by asserting that "the Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period." (*See* Amtrak's Petition @ 11.) This assertion is a misstatement of fact and law. Throughout its decision, the Court specifically eschewed such an approach - "precedent makes clear that the alleged incidents of discrimination cannot be isolated, sporadic or discrete;"[4] "Morgan must raise a genuine issue of disputed fact as to 1) the existence of a continuing violation - be it serial or systemic; and 2) that the violation continued into the limitations period;"[5] "such incidents are not discrete or isolated;"[6] and "the incidents demonstrate a regular pattern of potentially retaliatory conduct throughout Morgan's tenure."[7]

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[3]The jury delivered a note signed by all of the jurors along with the verdict, commenting on the verdict and the evidence, and condemning Amtrak's management for engaging in "grossly unprofessional and questionable ethical conduct."

[4](*Morgan*, 232 F.2d *supra* at 1015.)

[5](*Morgan*, 232 F.2d *supra* at 1016.)

[6](*Ibid.*)

[7](*Morgan*, 232 F.2d *supra* at 1017.)

AMTRAK's contention that the *Morgan* decision is inconsistent with decisions by this Court is equally flawed. A close reading of the relevant Ninth Circuit decisions plainly reveals that the Ninth Circuit has always abided by the Supreme Court's admonition that the continuing violation theory applies only where the plaintiff can show at least one related violation of Title VII within the statutory period. AMTRAK's portrayal of the Ninth Circuit as a "renegade" is patently misleading; Ninth Circuit jurisprudence is echoed in the Second, Third, Sixth, Eighth and District of Columbia Circuits.

The doctrine of continuing violation is an equitable one; there is no stronger case than this that cries out for equity and swift justice. AMTRAK's assertion that MR. MORGAN "sat on his rights" is incredibly arrogant. Mr. Morgan tried to work within AMTRAK's system and as the jury lamented in its note commenting on the verdict, "the EEO office of AMTRAK was woefully remiss in following up & supervising its recommendation for procedural changes at the Oakland facility, and their general sincerity questionable." To penalize MR. MORGAN for trusting AMTRAK under these circumstances would truly mock Title VII's mandate for racial equality in the workplace.

REASONS FOR DENYING THE WRIT

I. THE DOCTRINE OF CONTINUING VIOLATION WAS CORRECTLY APPLIED TO THIS CASE

The three hundred (300) day statutory period under Title VII operates as a statute of limitations, (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982)), and a claim under the Act will not be sustained if it is based on an event or events that occurred more than 300 days before the filing of a charge. Like a statute of limitations, however, the limitations period contained in Title VII is "subject to waiver, estoppel, and equitable tolling." (*Zipes*, 455 U.S. *supra* at 393; *Draper v. ECR Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998).)

It is well settled that the purpose of the continuing violation doctrine is to allow aggrieved persons "the maximum benefit of the law." (*Zipes*, 455 U.S. *supra* at 395.) In *Zipes*, *supra* at 398, the Court pointed out that:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to a waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

(*Accord*, *Milton v. Weinberger*, 645 F.2d 1070, 1075, n. 14 (D.C. Cir. 1982) ("continuing violation principle is a judicial creation designed to carry out the congressional intent of affording the most complete relief possible in

Title VII cases.")))

The continuing violation doctrine has long allowed Courts to toll the statute of limitations in certain circumstances. A plaintiff who alleges a policy or practice of systemic discrimination, as opposed to alleging only individual discriminatory acts, may utilize the continuing violation doctrine. (*Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997); *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999); *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990).)

It is well established that "[u]nder the continuing violation doctrine, ***'a systematic policy of discrimination*** is actionable, even if some or all of the events evidencing its inception occurred prior to the limitations period.'" (*Sosa v. Hiraoka*, 920 F.2d *supra* at 1455 (emphasis added); *see also, Reed v. Lockheed Aircraft Corporation*, 613 F.2d 757, 760-761 (9th Cir. 1980) (continuing violations are actionable).) If the plaintiff shows "the maintenance of a discriminatory system both before and during the limitations period," the action is timely. (*Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989).)

These cases make clear that long before the Ninth Circuit's decision in *Fielder v. UAL Corporation*, 218 F.3d 973 (9th Cir. 2000) and *Morgan*, the continuing violation doctrine was applied to discrimination, harassment, and retaliation claims.[8] Indeed, a special relationship exists between the

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[8]As *Fielder* was also a retaliation case and the Court applied the continuing violation theory to the retaliation claims, AMTRAK's

continuing violation doctrine and a hostile environment claim, as noted in *Draper,* 147 F.3d *supra* at 1108:

> A "hostile work environment" occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986). Accordingly, claims that raise a genuine issue of material fact as to the existence of a hostile environment involve allegations of continuing violations. *See Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996) (noting that a situation amounting to a hostile work environment is "an ongoing nightmare for the employee victim"); *Galloway v. General Motors Svc. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996) ("Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event.").

As noted earlier, AMTRAK ignores the fundamental Ninth Circuit requirement for invoking the continuing violation doctrine: that there be *a continuing pattern* of discrimination.[9] The Ninth Circuit has not hesitated to find that when

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contention that *Fielder* is narrower in scope than *Morgan* is also misleading.

[9]Ironically, AMTRAK's Motion for Summary Judgment did not even address Mr. Morgan's hostile environment claim, and thus, Amtrak was not entitled to any type of summary adjudication of that claim. Where a Motion for Summary Judgment or Summary

an employer stops discriminatory conduct and the employee subsequently takes no action during the statutory period, the employee cannot thereafter sue. (*Green*, 883 F.2d *supra* at 1472; *Draper*, 147 F.3d *supra* at 1111; *Williams v. Owens-Illinois*, 665 F.2d 918, 924 (9th Cir. 1982).) In this case, the district court as well as a unanimous *Morgan* panel found that alleged violations of MR. MORGAN's Title VII rights occurred within the statutory period. (*Morgan* @ 1016-1017.)

II. NINTH CIRCUIT JURISPRUDENCE DOES NOT CONFLICT WITH SUPREME COURT DECISIONS

The Supreme Court cases cited by AMTRAK validate the continuing violation doctrine and define its parameters in ways which do not affect MR. MORGAN's case. (*See e.g.*,

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Adjudication does not address claims, it does not bar any issue as to which summary adjudication was not either sought or denied. (*Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991), *cert denied* 112 S.Ct. 617, 116 L.Ed.2d 639; *Tirona v. State Farm Mut. Auto. Ins.*, 812 F.Supp. 1083 (D.Hi. 1993); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2nd Cir. 1990), on remand 752 F.Supp.102.) The Court retains full power to make a complete adjudication on the remaining claims at the appropriate time. (*Audi Vision, Inc. v. RCA Mfg. Co.* 136 F.2d 621, 147 ALR 574 (2nd Cir. 1943); *Woods v. Mertes* 9 F.R.D. 318 (D.C.Del. 1949).) In an *Order Re Hostile Work Environment Claim* filed on October 22, 1998, the district court acknowledged that Mr. Morgan's hostile environment claim survived AMTRAK's Motion for Summary Judgment but **still refused** to apply the continuing violation doctrine to even the hostile environment claim.

United Airlines v. Evans, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980).)

In *Evans*, the plaintiff alleged that she was discriminated against based on her employer's seniority system. She had been rehired after leaving the company based on its alleged discrimination, and she argued that her seniority upon rehire should have included her time away for work due to her employer's discrimination. (*Evans*, 431 U.S. 553-554.)

The Court held that to make use of the continuing violation theory in the context of a Title VII case the plaintiff must show a Title VII violation has occurred within the statutory period; not simply that the effects of a pre-statutory violation continue into the statutory period. (*Evans*, 431 U.S. 558-559.) The Court found that the seniority system was neutrally applied to men and women, and that it was plaintiff's original pre-statutory separation from work that triggered her duty to file an EEOC charge, not the neutral application of the seniority system on her return. (*Id.*)

Ricks simply applied *Evans* to a case in which the plaintiff argued that he was denied tenure because of his national origin in violation of Title VII and 42 U.S.C. § 1981. (*Ricks*, 449 U.S. *supra* at 252.) The Court determined that Mr. Ricks should have filed within 300 days of the denial of tenure because the subsequent one year teaching contract coupled with termination was a normal effect of the denial of tenure. (*Ricks*, 449 U.S. *supra* at 257-258.) There were no allegations of continuing violations or of illegal acts subsequent to the terminations in *Ricks*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981), or *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 232 (1976).

In the Ninth Circuit, to make use of the continuing violation doctrine a plaintiff must demonstrate that at least one act of harassment or discrimination occurred within the statutory period; simple effects of pre-statutory discrimination or harassment are not enough. (See, e.g., *Anderson*, 190 F.3d *supra*; *Draper*, 147 F.3d *supra*.) Plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during that period." (*Green*, 883 F.2d *supra* at 1480.)

III. THERE IS NO MEANINGFUL CIRCUIT SPLIT

Only four (4) Circuits have clearly adopted and strictly applied the "notice limitation" articulated in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983).) It appears that only the First, Fifth, Seventh and Eleventh Circuits have superimposed a "notice" limitation onto the elements of the continuing violation doctrine.[10] Nonetheless, even *Berry*, 715 F.2d *supra* at 981, emphasizes that the decision about what constitutes a continuing violation "turns on the facts and the context of each particular case," and is not subject to a litmus test of three or so factors.

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[10]Although *Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) purports to adopt the notice limitation in the First Circuit, in *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001), the Court pointed out that in *Provencher*, there was no discriminatory act alleged within the charge filing period. Nonetheless, the First Circuit in *O'Rourke* does adopt the notice limitation.

In *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310-1311, n. 4 (10th Cir. 1999), the Tenth Circuit similarly emphasized that there is "no bright line test;" and "[the three enumerated] factors [referenced in *Berry*] are merely tools to assist court's analysis." The Tenth Circuit also agrees with the Ninth Circuit that the plaintiff must demonstrate one act within the relevant limitations period and that earlier acts are part of a continuing pattern of discrimination. (*Id.* at 1310-1311.) Amtrak's reliance on *Purrington v. University of Utah*, 996 F.2d 1025, 1029 (10th Cir. 1993) is misplaced because there the Court specifically found that the two incidents alleged by plaintiff were not "related closely enough to evidence a dogged pattern of discrimination and thereby constitute a continuing violation."

West v. Philadelphia Elec. Co., 45 F.3d 744, 754-755 (3rd Cir. 1995) is entirely consistent with the Ninth Circuit's approach. In *West*, the plaintiff alleged that he had been subjected to a racially hostile environment. This environment included Mr. West's receipt of a Klu Klux Klan Christmas card, hostile conversations occurring with a white foreman, and management conclusions that race relation problems existed at work. (*West*, 45 F.3d *supra* at 749-751.) Much of this evidence was excluded during trial based on the fact that it fell outside of the statutory period.

On appeal, Mr. West argued that the trial court erred in excluding the pre-statutory evidence. The Third Circuit ruled in Mr. West's favor. In the process the Court heavily emphasized the "natural affinity" between the hostile work environment and continuing violation claims:

> In the arena of sexual [or racial] harassment, particularly that which is based on the existence of a hostile environment, it is reasonable to expect that violations are continuing in nature: a hostile environment results from acts of sexual [or racial] harassment which are pervasive and continue over time. . . . Accordingly, claims based on hostile environment sexual [or racial] harassment often straddles both sides of an artificial statutory cutoff.

(*West*, 45 F.3d *supra* at 755 (citing a Fifth Circuit case).)

The Court next held:

> Although we decline to adopt a *per se* rule that a properly alleged hostile work environment claim also constitutes a continuing violation, we agree that West has alleged facts sufficient to support application of the continuing violations theory in this case. First, all of the incidents alleged by the plaintiff involved racial harassment . . . Second, the incidents are alleged to have occurred consistently over the period since 1986, with increased frequency in 1989-1990. (*Id.*)

The Court's discussion of *Berry* and the "notice inquiry" is relegated to footnote nine, wherein the Court remarks "[w]e also find this approach, providing a non-exhaustive list of factors, to be helpful," and then simply sets forth the *Berry* requirements without further reference.

In the Second Circuit, the continuing violation exception "extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimina-

tion even if those acts, standing alone, would have been barred by the statute of limitations." (*Annis v. County of Westchester*, 136 F.3d 239, 246 (2nd Cir. 1998); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2nd Cir. 1996).) No notice limitation is imposed. (*Id.*)

A continuing violation may be found "where there is proof of specific ongoing discriminatory polices or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." (*Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998); *see also Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569, n. 4 (2nd Cir. 2000.)

The Sixth Circuit has long recognized that an ongoing, continuous series of discriminatory acts may be challenged if one of those discriminatory acts occurred within the limitations period. (*Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir. 1992); *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991); *Alexander v. Local 496*, 177 F.3d 394 (6th Cir. 1999).) The Circuit does not impose a notice limitation upon plaintiffs. Instead, when or if a continuing violation is shown, "a plaintiff is entitled to have a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." (*Alexander*, 177 F.3d *supra* at 408; *Accord, Kovacevich v. Kent State University*, 224 F.3d 806, 829-830 (6th Cir. 2000).)

The Sixth Circuit views continuing violations as falling into two categories. *(Haithcock*, 928 F.2d at 677.) The first

category of continuing violations arises "where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation; that is where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups." (*Dixon*, 928 F.2d at 216.) At least one of the forbidden discriminatory acts must have occurred within the relevant limitations period. (*Ibid.*) The second category of continuing violations arises "where there has occurred a longstanding and demonstrable policy of discrimination . . . there must be a continuing over-arching policy of discrimination." (*Id.* at 217.)

The Eighth Circuit recognizes that evidence of incidents occurring outside the limitations period may be admissible in a case where a continuing violation has been alleged. *(Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 563 (8th Cir. 1992); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997).) The Circuit also recognizes that a hostile environment can constitute such a continuous violation. (*Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996).)

Despite opportunity to do so, the District of Columbia Circuit has not demonstrated any inclination to adopt a "notice limitation." (*See Curry v. District of Columbia*, 195 F.3d 654, 661, n. 14 (D.C. Cir. 1999); *Anderson v. Zubieta*, 180 F.3d 329, 334-335 (D.C. Cir. 1999); *Palmer v. Kelly*, 17 F.3d 1490, 1496 (D.C. Cir. 1994).)

Although AMTRAK alleges that a serious "circuit split" merits the high court's attention, in the context of the facts of this case, the purported split is illusory.

IV. THE PURPOSE OF THE NOTICE LIMITATION WOULD NOT BE SERVED IN THIS CASE

The cases relied upon by AMTRAK often use the notice limitation to determine whether a group of acts forms a pattern sufficient to invoke the continuing violation doctrine or whether those acts represent discrete self-contained activities which are actionable by themselves, overemphasizing the importance of temporal activity. (*See Berry*, 715 F.2d *supra* at 981.) The notice limitation arguably places a plaintiff in an untenable position, having to demonstrate that: (1) there were enough pre and post statutory acts to create a continuing pattern of discrimination; and (2) there was not enough of a pattern to put the plaintiff on notice that her rights were being violated. (*See O'Rourke v. City of Providence*, 235 F.3d *supra* at 732 (potential anomaly noted by the court; issue often better resolved by juries.)

In this case, the purpose of the notice limitation would not be served and justice would be clearly thwarted. AMTRAK was on early notice that its harassment of Mr. Morgan was unfair and likely to be challenged, and it ignored his complaints and failed to take appropriate steps to ensure its own compliance with the law. In this case, AMTRAK is hardly in a position to complain of "unfair surprise" or prejudice of any kind. When the plaintiff has made an effort to assert his rights short of litigation, he or she should not be punished when the employer responds by dragging its feet, failing to properly investigate the complaints, or not attempting to correct the discriminatory conduct.

In this case, Mr. Morgan presented substantial evidence of an environment heavily polluted with racial bias and retaliatory intent, continuing into the limitations period. While AMTRAK chides the Ninth Circuit for citing to certain unspecified evidence at trial, Mr. Morgan's opposition to Amtrak's motion for summary motion presented substantial evidence of racially motivated conduct to the district court. (*See Appendix B* at pp. 45a, 46a and 49a.)

The degree of "permanence" to be attributed to AMTRAK's actions is extremely questionable given that many of the unfair actions taken against Mr. Morgan were remedied through union grievances, and did not even rise to the level of formal adverse actions. The counsellings, the punitive and demeaning job assignments, the denial of training, union representation, and other job benefits without any explanation or justification, taken as discrete acts would hardly qualify for compensatory damages or warrant a federal lawsuit. Taken together as a series of cumulative acts, they become powerful evidence of "an ongoing nightmare" for Mr. Morgan. (*See Draper*, 147 F.3d *supra* at 1108, citing *Gipson v. KAS Snacktime Co.*, 83 F.3d *supra* at 229.

Furthermore, it is clear that the conduct complained of by Mr. Morgan was significant in its cumulative effect - AMTRAK was "building a case" against him and obviously, setting him up to be terminated. As noted earlier, the district court's failure to apply the continuing violation doctrine coupled with its failure to distinguish the hostile environment claim from the discrimination and retaliation claims effectively denied Mr. Morgan a fair trial on the hostile environment claim. (*See* Note 9, *supra*.) Under the circumstances of this case, justice and equity compel reversal of the judgment.

CONCLUSION

For all of the above reasons, AMTRAK's Petition should be denied in its entirety. The continuing violation doctrine clearly and appropriately should have been applied to this shockingly blatant case of racial harassment, race discrimination and retaliation. This case is simply not the one to provide guidance to those minority circuits who have attempted to limit the continuing violation doctrine.

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